No. 80-1818

In the Supreme Court of the United States

October Term, 1980

FILED
JUN 1 1981
ALEXANDER L. STEVAS
CLERK

JAMES E. MCLENDON, JR.,

Appellant

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

Appellee

ON APPEAL FROM THE ALABAMA COURT
OF CIVIL APPEALS

MOTION TO DISMISS APPEAL

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COUNSEL FOR APPELLEE

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STATE OF ALABAMA
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MOTION TO DISMISS APPEAL

May it please the Court:

Appellee, pursuant to Rule 16 of this Honorable Court, moves that the appeal in this cause as filed by Appellant be dismissed.

I. GROUNDS FOR MOTION TO DISMISS APPEAL

Appellee's Motion to Dismiss is predicated upon the following grounds:

A. FAILURE TO COMPLY WITH RULES OF UNITED STATES SUPREME COURT

Appellant failed to comply with the Rules of this Court for perfecting an appeal in that: (1) for failure to take the appeal within the time allowed by law, (2) for failure to file a properly completed jurisdictional statement within the time allowed by the rules of this Court for docketing the appeal, and (3) for failure to show a proper statutory authority conferring jurisdiction upon this Court to hear this appeal.

(1) Notice Of Appeal Not Timely Filed

The time for filing a notice of appeal from a state court judgment for review by this Court is controlled by 28 U.S.C. § 2101(c), which provides the appeal must be taken within 90 days after entry of the judgment or decree which is the subject of the appeal.

In this cause, the Alabama Supreme Court on January 30, 1981 denied a Writ of Certiorari sought by the Appellant herein to review the decision of the Alabama

Court of Civil Appeals. (395 So.2d 73). The 90th, and last day, to timely file the Notice of Appeal with the Alabama Court of Civil Appeals was April 30, 1981. The Notice of Appeal was actually filed on May 6, 1981 - 96 days after the denial or the Writ of Certiorari by the Alabama Supreme Court. (App., p. A-2).

The Notice of Appeal was transmitted by the Appellant to the Alabama Court of Civil Appeals by regular first class mail, and was received by the Clerk of that court on May 6, 1981. The Alabama Rules of Appellate Procedure (ARAP) provide that filing is accomplished when the document is received by the clerk, unless certified or registered mail is used. Rule 25(a), ARAP. (App., p. A-1). Since the rules of this Court do not prescribe the manner of filing with the court whose decision is being appealed, it appears the rules of the court where the notice is to be filed would control the manner of filing.

Furthermore, even if filing was accomplished upon mailing by regular mail, as provided by Rule 28.3 of this Court, the notice was not timely mailed to the Clerk of the Alabama Court of Civil Appeals. The official postmark of the

United States Postal Service placed upon the envelope containing the Notice addressed to the Clerk of the Court of Civil Appeals shows conclusively that it was mailed on the afternoon of May 4, 1981, more than 90 days after the decision of the Alabama Supreme Court. Attached hereto as exhibits 2 and 3 (pages A-2 and A-3 of Appendix) are certified copies of the Notice of Appeal as filed with the Clerk of the Alabama Court of Civil Appeals and the envelope in which the Notice was mailed to the Clerk.

Rule 11.4 of this Court, provides that the time for filing the Notice of Appeal may not be extended.

(2) Jurisdictional Statement Not Completed Upon Filing

The rules of this Court require the Appellant to docket the case within 90 days of the entry of the judgment or decree being appealed. Rule 12.1. Further, Rule 12.3 requires the Appellant, at the time of docketing the case, to file 40 copies of the jurisdictional statement, "which shall comply in all respects with Rule 15." (emphasis added)

Rule 15, which outlines the items to be included in the jurisdictional statement, at subsection .1(j)(iv) requires the appendix to the jurisdictional statement to contain "A copy of the notice of appeal showing the date it was filed and the name of the court where it was filed." A copy of the Notice of Appeal was not included in the jurisdictional statement filed by the Appellant contrary to Rule 15.

Furthermore, had the Appellant properly included a copy of the Notice of Appeal in the jurisdictional statement, the case probably would not have been placed on the docket by the Clerk because Rule 12.1 provides: "The Clerk will refuse to receive any jurisdictional statement in a case in which the notice of appeal has obviously not been timely filed."

The Notice of Appeal, if it had been included in the jurisdictional statement, would have shown conclusively that it was not timely filed. It would have shown clearly that it was filed with the Alabama Court of Civil Appeals 96 days after denial of the Writ of Certiorari by the Alabama Supreme Court - 6 days later than the maximum time allowed by law and by the rules of this Court.

(3) No Statute Cited Conferring Jurisdiction

The Notice of Appeal prepared by the Appellant, and the Jurisdictional Statement submitted by the Appellant to this Court asserts that jurisdiction for this purported appeal is ". . .pursuant to 28 U.S.C. 1275(2)," (page 2, Appellant's Jurisdictional Statement). At the time the Notice of Appeal and Jurisdictional Statement were prepared, and at the present time, Title 28, United States Code does not contain a section "1275(2)." It thus appears the Appellant has based his appeal upon a non-existent statute or has misstated the correct statute upon which an appeal may be brought.

B. LACK OF A SUBSTANTIAL FEDERAL QUESTION

As further ground for dismissing this appeal, Appellee states that such appeal does not present a substantial federal question. In Springer v. United States, 102 U.S. 586, 594, 26 L.Ed. 253, 256 this Court stated:

> The prompt payment of taxes is always important to the public welfare. It may be vital to the

> existence of a government. The idea that every tax payer is entitled to the delays of litigation is unreason. If the laws here in question involved any wrong or unnecessary harshness, it was for Congress or the people who make congresses to see that the evil was corrected. The remedy does not lie with the judicial branch of the Government.

In Phillips v. C.I.R., 283 U.S. 589, 596, 51 S.Ct. 608, 611 this Court also stated that:

> Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. (cite omitted).

In the present case, not only was the Appellant granted an administrative hearing, but the assessment was actually changed based on information presented at the hearing. (Appellant's Jurisdictional Statement, page A-18 and A-19).

In addition, it is submitted that the state statute in question, §40-2-22 Code of Alabama 1975, which is set forth in Appellant's Jurisdictional Statement at A-9 through A-17, does provide the taxpayer with an adequate opportunity for an ultimate judicial determination of his tax liability. The taxpayer may pay the tax or post a supersedeas bond in double the amount of the assessment as security for the tax, interest and costs and file an appeal with the appropriate state circuit court.

In the Phillips case, supra, the taxpayer raised a constitutional objection to the requirement that a bond is required to be filed before collection will be stayed while a case is pending before the Circuit Court of Appeals. In addressing the objection, this Court stated:

> As to the first of these objections, it has already been shown that the right of the United States to exact immediate payment and to relegate the taxpayer to a suit for recovery is paramount. The privilege of delaying payment pending immediate judicial review, by filing

a bond, was granted by the soverign as a matter of grace solely for the convenience of the taxpayer. (283 U.S. 589, 599, 51 S.Ct. 608, 612).

II. CONCLUSION

Appellee moves this Court, in view of the foregoing grounds presented herein, to grant its Motion to Dismiss this appeal for lack of jurisdiction, failure to comply with the rules of this Court, and want of a substantial federal question.

Respectfully submitted,

Charles A. Graddick

CHARLES A. GRADDICK
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State of Alabama

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COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I, B. Frank Loeb, of Counsel for Appellee and a Member of the Bar of the Supreme Court of the United States, certify that I have served three copies of the foregoing Motion to Dismiss on the Honorable Leo E. Costello, Attorney for Appellant by depositing same in the United States post office, with first class postage prepaid, addressed to him at 3716 Fifth Avenue, South, Birmingham, AL 35222, this the 27th day of May, 1981.

B. Frank Loeb

B. FRANK LOEB

OF COUNSEL FOR APPELLEE

APPENDIX

EXHIBIT 1

Alabama Rules of Appellate Procedure

RULE 25

FILING AND SERVICE

(a) Filing. Papers required or permitted to be filed in an Appellate Court shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that papers shall be deemed filed on the day of mailing if certified or registered mail is utilized.

* * *

IN THE SUPREME COURT OF THE STATE OF ALABAMA

JAMES E. McLENDON, JR., *

Appellant, *

Vs. * Case No. 2317

STATE OF ALABAMA *
DEPARTMENT OF REVENUE, *

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that James E. McLendon, Jr., the Appellant above named, hereby appeals to the Supreme Court of the United States, from the final judgment of the Alabama Court of Civil Appeals entered in this action on September 17th, 1981.

This appeal is taken pursuant to 28 U.S.C. 1275(2).

COSTELLO & STOTT
Attorneys for Appellant

By _____
3716 South 5th Avenue
Birmingham, Alabama 35222
(205) 591-6920

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal has been served on Charles Graddick, Attorney General, State of Alabama, B. Frank Loeb, Assistant Counsel, Department of Revenue, and Assistant Attorney General, State of Alabama, Room 201 Adminstrative Building, Montgomery, Alabama 36130. Dated this the 14 day of May, 1981.

_____
Of Counsel

I, John H. Wilkerson, Jr., Clerk of the Court of Civ. Appeals of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said court. Witness my hand this 13 day of May, 1981.

John H. Wilkerson, Jr.

Clerk, Court of Civil Appeals of Alabama

EXHIBIT 2

Certified copy of Notice of Appeal filed with Clerk of Alabama Court of Civil Appeals.

EXHIBIT 3

Certified Copy o envelope used to mail Notice of Appeal.

COSTELLO & STOTT
ATTORNEYS AT LAW
3716 SOUTH 5TH AVENUE
BIRMINGHAM, ALABAMA 35222

Court of Civil Appeals of Alabama
2600 East South Boulevard
Room 250
Montgomery, Alabama 36116

I, John H. Wilkerson, Jr., Clerk of the Court of Civ. Appeals of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument herewith set out as same appears of record in said court. Witness my hand this 13th day of _____, 1981

Clerk, Court of Civil Appeals of Alabama